UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ENTERED
Clerk, U.S. District Court
Apr 5, 1996
Central District of California
By Santa Ana Deputy

FILED
Clerk, U.S. District Court
April 3, 1996
Central District of California
By Santa Ana Deputy

PATRICIA A. BILLETER
Plaintiffs,

v.

CARL LUEM, M.D. et al.,
Defendant.

SA CV 92-221-AHS(EEx)

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AFTER COURT TRIAL

I.
PROCEDURAL HISTORY

On March 6, 1995, notice was given that this matter was scheduled for jury trial to commence November 7, 1995. Thereafter, but before the time of trial, it came to the court's attention that notices sent by the Clerk's office to defendant went unanswered. On October 16, 1995, an Order to Show Cause, returnable one week later, was directed to defendant for his failure to keep the court advised of his current telephone number and address so that he could receive necessary communications from the court. No response was received.

When trial was called on November 7, 1995, the defendant did not appear. Defendant had submitted no jury instructions or proposed voir dire. Plaintiff represented that defendant was an essential witness and was intended by plaintiff to be called as the first witness at trial. The day before trial was scheduled to begin, Attorney Lawrence A. Strid had attempted to file an "Ex Parte Application for Order Allowing Substitution of Attorney and Continuance of Trial." Part of this application, filed in the form of a declaration under penalty of perjury by counsel, stated that defendant's file "fills two banker boxes" and that the declarant, Mr. Strid, "will not be sufficiently familiar with the file to conduct trial by November 7, 1995." This assertion was followed by a request to continue the trail date "to a date at least 120 days away."

Attorney Strid attempted to appear on behalf of defendant on the morning of trial, representing that it was his information that defendant was in surgery but ready to fly to California from Georgia for trial. Mr. Strid said he would be ready to try the case.

The Court found that defendant's immediate presence was necessary and ruled that delaying the trial to obtain his presence was not justified in light of the long-standing trial date, the defendant's failure to respond to the Court's Order to Show Cause, and the court's schedule for other matters. The Court therefore denied counsel's request to appear and substitute in for defendant.

Trial to the Court was held November 7, 1995. At the close of plaintiff's evidence the Court ruled on the issues presented by the Pretrial Order. Plaintiff's counsel was directed to prepare, serve, and lodge proposed Findings of Fact and Conclusion of Law.

Upon further review of the evidence and law, the

Court enters the following findings of fact and conclusions of law in support of judgment for plaintiff pursuant to F. R. Civ. P. Rule 52 and Local Rule 14.3.

II.
FINDINGS OF FACT

1. Plaintiff suffered from breast asymmetry, her right breast being of a size almost double that of her left breast. Her physical distortion was sufficiently great that she wore a prosthesis to create an even appearance about her upper torso. Exhibits 3, 4, and 5 depict plaintiff's pre-operative condition.

2. Plaintiff consulted with Dr. Carl R. Luem, originally as her obstretician-gynecologist. She felt comfortable with him, and he learned from her how much her breast asymmetry troubled her.

3. Plaintiff was operated on three times by defendant Luem: 10/27/89; 12/18/89; and 5/21/90.

4. Defendant represented to plaintiff that performing a reduction and augmentation was "not a big deal." Defendant did not inform plaintiff that he would remove tissue from the left (the smaller) breast. At no time was plaintiff informed that excessive amounts of tissue would be extracted from the right breast so that an implant would have to be inserted. Had plaintiff been so informed, she would not have agreed to surgery.

5. Although defendant's medical records as produced during litigation show an extended discussion of the risks of surgery (see Exhibit 6-5), plaintiff's Exhibit 19-1, a copy of one page of plaintiff's medical records obtained by her in 1990 or 1991 (before defendant was given notice of suit), reveals no such discussion of the risks of mammoplasty.

6. Exhibit 6-43, signed by plaintiff on 10/23/89, shows that she signed a form discussing "Augmentation Mammoplasty." The word "reduction" was added on by defendant after the surgery. The same is true for Exhibit 6-46. Comparison with exhibits 17 and 18 shows the original condition of the "consents."

7. Defendant admitted that he altered plaintiff's medical records. *See* and *compare* Exhibits 19-1 through 19-9 with Exhibits 6-5 through 6-8, 6-21, 6-22, 6-42, 6-43, and 6-45.

8. Defendant tried to cover up in the medical charts the grievous injuries that he inflicted on plaintiff by disguising the nature of the "informed consents" that she signed and the information that he purportedly provided. There is no evidence of consent for the third surgery.

9. After the first surgery, plaintiff learned that she had implants in both breasts, although the consent form does not disclose that any implant was to be placed in plaintiff's right breast, the larger breast. In addition, too much tissue had been removed from the right breast so that it was now smaller than the left breast.

10. Plaintiff's left breast appeared to be the same size as before the surgery. The post-operative report for the first surgery indicates that healthy tissue was also removed from the left breast (the breast to be augmented). An implant was inserted in this breast.

11. Plaintiff suffered from infections thereafter and lost her entire right nipple; a small amount of areola remained on the left. The darker area now visible is mainly a scar.

12. Plaintiff's second operation resulted in a smaller implant being inserted in the left breast. Exhibit 78 shows that plaintiff consented to an operation concerning a "wound closure." Defendant showed plaintiff albums of

photos representing to plaintiff that he had previously performed such surgeries and that his past surgeries were successes.

13. Plaintiff's left breast began to "crust" and develop depressions, ultimately exposing the implant. Numerous efforts in defendant's office, such as cutting away dead tissue, suturing, and other steps did not result in the left breast's healing.

14. Plaintiff's third surgery in May 21, 1990, resulted in the larger implant being removed from plaintiff's right breast and a smaller implant being inserted.

15. Exhibits 8, 9, and 14-1 through 14-9 shows plaintiff's scars, indentations, loss of nipples, and plaintiff's generally deformed post-operative breast condition. The disfigurement resulted in numbness of the entire front of both breasts.

16. Since April of 1991, plaintiff has been disabled from her regular occupation, that of wallpaper applicator and painter for interior decorating, because the tissue has tightened all around plaintiff's chest. The implants have also hardened, contributing to the tightening of plaintiff's upper torso. The scarring from the surgeries has also hardened. Plaintiff is unable to raise her arms over her head and has no mobility or strength to perform the interior decorating work.

17. Plaintiff suffers pain when she tries to lift things or raise her arms higher than her head. Plaintiff is permanently prevented from breast-feeding a baby because she has no nipples.

18. Plaintiff has had to accept to a lesser paying administrative job, earning at time of trial approximately $19,000.00 per year. She will have to stay in this position until retirement in her 60's, since it does not appear that reconstructive surgery can restore plaintiff's mobility or

strength (even if her appearance can be restored).

19. Plaintiff previously had a **net** income that averaged $44,482 for the years 1984 through 1988 (the year before plaintiff's first surgery). See Exhibit 35.

20. Plaintiff's current average gross earnings, averaging the years 1990 through 1994, are $17,213. See Exh. 33.

21. Plaintiff's past medical expenses to date of trial were $14,517.

22. Defendant Carl Luem, M.D. performed surgeries that were substantially different from the operations to which plaintiff consented. Defendant committed two medical batteries on plaintiff's left breast which occurred during the first and second surgeries, and two medical batteries on plaintiff's right breast which occurred during the first and third surgeries.

23. Defendant Carl Luem's conduct during the surgeries performed on plaintiff were an intentional deviation from any consents given by her. *See* Decl. Of Robert T. Miner, M.D. filed Feb. 15, 1994, at 8, ¶ 24.

24. Any signed consent form or verbal consent given by plaintiff regarding the subsequent surgeries was vitiated by the conduct and communication by defendant Carl Luem, M.D., to plaintiff regarding her first surgery. Plaintiff did not consent to the surgeries and treatment as ultimately provided by defendant Carl Luem, M.D.

25. Any and all consent given by plaintiff for the surgeries was conditional. Defendant proceeded without observing the conditions placed on plaintiff's consent.

26. The acts of defendant Carl Luem, M.D., proximately caused damages to plaintiff as follows:

a. $604,563.00 for loss of earnings, $127,200 in loss earnings from 1991 through 1994; and $477,363

in lost future earnings;

b. $82,017.00 for past and future medical bills, $14,517.00 for past medical bills (Exh. 21-22, 25, 26, 31); $50,000 for future reconstructive surgery, according to Dr. Miner; $10,000 for future hospitalization; and $7,500 for future psychiatric counseling;

c. $500,000.00 in general damages.

27. Clear and convincing evidence as required by California Civil Code section 3294(a) has been adduced to show that defendant Carl Luem, M.D., is guilty of oppression, fraud and malice and should be punished with punitive damages. Although there is limited evidence of defendant's worth, there is evidence that defendant currently practices surgery as an obstetrician-gynecologist. The sum of $100,000 is sufficient to achieve the punitive purposes of exemplary damages, given the award of compensatory damages and other circumstances.

28. Plaintiff did not contribute to her damages.

CONCLUSION OF LAW

1. Defendant Carl Luem's conduct constituted a medical battery on plaintiff.

2. Plaintiff did not consent as a matter of law to the treatment provided by Defendant Carl Luem, M.D.

3. Plaintiff is entitled to recovery compensatory and punitive damages.

4. Plaintiff is entitled to judgment in the amount of $1,286,580.00.

IT IS SO ORDERED.

DATED: April 3, 1996.

/s/ ALICEMARIE H. STOTLER
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID TO ALL COUNSEL FOR PARTIES AT THEIR RESPECTIVE MOST RECENT, ADDRESS OF RECORD, IN THIS ACTION ON THIS DATE: 4/ 5/96

/s/
DEPUTY CLERK